No. 16-1140

In The Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES, d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF BLACK WOMEN FOR WELLNESS, CONSUMER ACTION, CONSUMER FEDERATION OF CALIFORNIA, PUBLIC GOOD LAW CENTER, AND PUBLIC HEALTH LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

THOMAS BENNIGSON
Counsel of Record
SETH E. MERMIN
SOPHIA TONNU
PUBLIC GOOD LAW CENTER
1950 University Avenue, Suite 200
Berkeley, CA 94704
(510) 336-1899
tbennigson@publicgoodlaw.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST

Amici curiae are consumer protection and public health organizations. *Amici* submit this brief to underscore the importance of ensuring that the information received by consumers, particularly in matters involving their health, is adequate, accurate, and not misleading.

Amici are concerned that the resolution of this case not compromise the state's ability to protect the public from deceptive advertising. By providing useful information to individuals who might not otherwise receive it, the FACT Act increases the likelihood that consumers will make informed decisions and reduces the chance that they will be misled. That is a goal fully consistent with the First Amendment.[1]

Black Women for Wellness is a woman-centered, community-based, education and advocacy organization working to empower Black women and girls to attain healthy lives and families. BWW believes that access to accurate health information and freedom from external coercion are essential for women's autonomous decision-making. BWW was a co-sponsor of the FACT Act in the California legislature.

Consumer Action is a national non-profit consumer education organization that empowers low- and moderate-income and limited-English-speaking

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[1] No counsel for a party authored this brief in whole or in part, and no one other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

consumers to prosper, and advocates for consumers' rights in the media and before lawmakers. Every day Consumer Action sees consumers – especially those who can least afford it – suffering significant harms from deceptive marketing.

Consumer Federation of California is a non-profit advocacy organization that works to enact consumer protection laws and regulations and ensure their enforcement, and conducts education and research on consumer issues. CFC has worked to strengthen and enforce laws regulating truth in advertising, preventing fraud and deceptive marketing, ensuring food and drug safety, and protecting low-income consumers.

The **Public Good Law Center** is a public interest law firm specializing in consumer protection, public health, and First Amendment law. Public Good has authored numerous *amicus* briefs in First Amendment cases concerning disclosure requirements and regulation of false advertising, and in cases involving debt collection, credit reporting, and other contexts in which disclosure regimes protect vulnerable citizens.

The **Public Health Law Center**, located at the Mitchell Hamline School of Law, Minnesota's largest law school, is a nonprofit legal center dedicated to public health. The Center helps community leaders develop and defend public policies that protect America's health, and has filed more than fifty briefs as *amicus curiae* in the nation's highest courts, many of them addressing the impact of the First Amendment on government's ability to protect

the public from deceptive advertising and preserve consumers' ability to make informed health decisions.

SUMMARY OF ARGUMENT

"[G]overnment is vested with the responsibility of protecting the health, safety, and welfare of its citizens." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). To fulfil this responsibility, "government may take broad[] action to protect the public from injury produced by false or deceptive ... product advertising. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 778 (1976). The principle applies perhaps even more to advertising for professional services, because of "the special possibilities for deception presented." *In re R.M.J.*, 455 U.S. 191, 203 (1982). Accepting NIFLA's contention that the First Amendment tolerates regulation of false advertising only for *paid* services would leave government unable to extend protection to low-income citizens who rely on *pro bono* professional services. The First Amendment does not require such an untenable consequence.

The modest disclosure requirements of the FACT Act are a response to an extensive and sustained history of deceptive representations. "Crisis pregnancy centers" [CPCs] routinely market themselves to women seeking abortions as neutral health care providers and pregnancy counselors, without disclosing their ideological mission to oppose abortion or that they provide neither abortions nor abortion referrals. Through their advertising, choice of names, locations, and appearance of their offices,

CPCs foster confusion between themselves and actual abortion providers. Once they get pregnant women into their offices, CPCs provide discredited misinformation about the medical and psychological dangers of abortion, and employ a variety of subterfuges to get women to delay abortion until it is too late, often even flatly lying about, for example, how advanced a pregnancy is or how long a woman may legally obtain one.

These are the hallmarks of a deceptive marketing campaign. If it concerned any other product or service, there would be no question that the state could act to dispel the deception. "Advertising that is false, deceptive, or misleading of course is subject to restraint." *Bates v. State Bar*, 433 U.S. 350, 383 (1977). In particular, California may seek to remedy the deception by requiring accurate, factual disclosures, such as those challenged here, subject only to First Amendment review only under the deferential standard that the disclosures be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Moreover, a pattern of deception like the one found here may justify industrywide regulation, without an individualized showing that each affected enterprise engaged in deception. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010).

NIFLA's efforts to distinguish the foregoing precedents on the ground that CPCs do not engage in commercial speech are not to the point. Neither the absence of fees nor their strong ideological convictions

give CPCs a right to engage in deceptive solicitations. Indeed, there is good reason to conclude that this *is* a commercial speech case: the speech burdened by the disclosures is promotional advertising intended to attract clients for services in a commercial marketplace.

But regardless of how that question is decided, the fact that CPCs do not charge for their services should not affect the standard of review. Deceptive speech is not entitled to protection when speakers enter the market as providers of services, a transacting public relies on the speech in question, and there is substantiated potential for concrete harm. The state has particular leeway to act when deceptive speech occurs in the context of *professional* services.

Petitioners' ideological mission does not change the level of review either. No one disputes Petitioners' right to advocate forcefully against abortion in the public sphere. What they may not do, however, is enter the market of health care providers, market their services under false pretenses, and dispense misinformation to clients. Petitioners may not have it both ways – disguising their advocacy by presenting themselves as health care providers and then objecting to any regulation affecting their 'professional' speech by claiming the First Amendment protections appropriate for advocacy on a matter of public concern.

NIFLA's objections are particularly misplaced, given that California has not attempted to restrict CPCs' speech in any way, but seeks only to require

CPCs to convey a neutral factual government message informing clients either of the providers' non-medical status or of the availability of other options.

ARGUMENT

I. THE FACT ACT IS A RESPONSE TO DECEPTIVE MARKETING AND THE PURVEYING OF MISINFORMATION.

The FACT Act was California's response to extensive evidence of a widespread pattern of deceptive outreach by CPCs creating the false impression that they help women seeking abortions. Women who arrive at CPCs expecting abortion assistance instead receive deceptive delaying tactics, intense pressure, and grossly inaccurate warnings about the health risks of abortion.

A. CPCs Employ Deceptive Advertising to Attract Low-Income Women Seeking Abortions.

"False and misleading advertising by clinics that do not provide abortions, emergency contraception, or referrals to providers of such services has become a problem of national importance." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1268 (9th Cir. 2017). CPCs attract pregnant women seeking abortions with advertisements offering "accurate abortion information,"[2] or

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[2] Alice Chen, *Crisis Pregnancy Centers: Impeding the Right to Informed Decision Making*, 19 CARDOZO J.L. & GENDER 933, 951 (2013).

"pregnancy options,"[3] without disclosing that they do not perform or refer women for abortions. CPCs routinely purchase phone directory listings under "abortion services" and buy advertising that will cause their ads to show up on internet search engines when users search for "abortion" and related terms.[4] CPC staff are taught to respond with evasions when callers ask directly whether they provide abortions.[5]

CPCs "purposely locate themselves in close proximity to abortion clinics in order to confuse ...women seeking abortions," because, in the words of one CPC activist, "The best client you ever get is one that thin[ks] they're walking into an abortion clinic."[6] A worker at a CPC located near a Planned Parenthood clinic told an investigator that the locations confuse clients "all the time."[7] They often compound the confusion by choosing names similar to that of the nearby clinic, often with matching acronyms,[8] as well as choosing misleadingly neutral names "to draw in

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[3] Beth Holtzman, *Have Crisis Pregnancy Centers Finally Met Their Match: California's Reproductive Fact Act*, 12 NW. J. L. & SOC. POL'Y 78, 86 (2017).

[4] *Id.*

[5] Meaghan Winter, *"Save the Mother, Save the Baby": An Inside Look at a Pregnancy Center Conference*, COSMOPOLITAN (Apr. 6, 2015), http://www.cosmopolitan.com/politics/a38642/heartbeat-international-conference-crisis-pregnancy-centers-abortion.

[6] Meagan McElroy, *Protecting Pregnant Pennsylvanians: Public Funding of Crisis Pregnancy Centers*, 76 PITT. L. REV. 451, 453 (2015).

[7] Kirsten Gallacher, *Protecting Women from Deception: The Constitutionality of Disclosure Requirements in Pregnancy Centers*, 33 WOMEN'S RTS. L. REP. 113, 125 n.92 (2011).

[8] Holtzman, *supra* note 3, 86.

unsuspecting women."[9]

Such deceptive practices are not isolated instances. Nationally, 79% of centers that advertised on Google "indicated that they provided medical services such as abortions," though they did not.[10] A 12-month investigation of California CPCs found that 69% of CPCs advertised that they provided unbiased counseling, but only 21% disclosed that they opposed abortion.[11]

Independent scholarly studies have found similar results throughout the United States. A study of 254 CPC websites in 12 states found that 87% did not disclose that the center was not a medical facility.[12] 58% of Georgia CPCs investigated did not provide notice that they do not provide or refer for abortion services.[13] In Nebraska, "[w]omen commonly located the abortion clinic via an online search. Crisis

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[9] Chen, *supra* note 2, 951.

[10] Hayley Tsukayama, *Google Removes "Deceptive" Pregnancy Center Ads*, WASHINGTON POST (Apr. 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads.

[11] NARAL, *Unmasking Fake Clinics: The Truth About Crisis Pregnancy Centers in California* 8 (2010), https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf.

[12] Amy Bryant *et al.*, *Crisis Pregnancy Center Websites: Information, Misinformation and Disinformation*, 90 CONTRACEPTION 601 (2014).

[13] Andrea Swartzendruber *et al.*, *Sexual and Reproductive Health Services and Related Health Information on Pregnancy Resource Center Websites: A Statewide Content Analysis*, 28 WOMEN'S HEALTH ISSUES 14 (2018).

pregnancy centers are among the top results when searching for abortion services in Nebraska .... [T]heir websites provide misinformation."[14]

Many unlicensed CPCs convey the appearance of a comprehensive health care clinic by requiring volunteers and staff to wear white lab coats or medical scrubs, among other stratagems.[15]

Deceptive advertising is a coordinated strategy. At the 2014 annual conference of Heartbeat International, the world's largest network of CPCs, speakers suggested a variety of marketing practices for "attracting 'abortion-minded' clients," including taking neutral-sounding names to disguise their mission; employing internet technology to target women searching for 'abortion' or 'abortion services'; deflecting phone inquiries about whether the center provides abortions; and making waiting rooms "feel like 'professional environments.'"[16] The Family Research Council and Care Net conducted market research to determine that innocuous names such as "Women's Resource Center" that disguised their mission would be effective in attracting women seeking abortions.[17] Concerted efforts to misrepresent

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[14] Valerie French *et al.*, *Influence of Clinician Referral on Nebraska Women's Decision-to-Abortion Time*, 93 CONTRACEPTION 236, 241 (2016).

[15] Holtzman, *supra* note 3, 83.

[16] Winter, *supra* note 5.

[17] Nat'l Abortion Fed'n, *Crisis Pregnancy Centers: An Affront to Choice*, at 3 (2006), https://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf.

their mission have been a hallmark of CPCs since their inception.[18]

B. CPCs Provide Discredited Misinformation and Employ Unprofessional Pressure Tactics.

Once pregnant women arrive at CPCs, they are likely to receive significant misinformation. A 2006 Congressional investigation found that 87% of clinics surveyed nationally provided medically inaccurate information about abortion.[19] Clients were told that abortion dramatically increased risks of breast cancer, infertility, and mental illness.[20] All of these contentions are contrary to medical consensus.[21] A more recent twelve-state study of 254 CPC websites found that 80% contained inaccurate or misleading information about the risks of abortion.[22] CPCs also purvey misinformation about the ineffectiveness of contraception.[23]

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[18] *Consumer Protection and Patient Safety Issues Involving Bogus Abortion Clinics: Hearing, Subcomm. on Regulation, Bus. Opportunities, & Energy*, 102d Cong., at 68-69 (Sept. 20, 1991) (quoting early CPC training manual), http://hdl.handle.net/2027/pst.000019273587.

[19] Minority Staff of H. Comm. on Gov't Reform, 109th Cong., *Report on False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers*, at 8 (July 2006) [Waxman Report], http://www.chsourcebook.com/articles/waxman2.pdf.

[20] *Id.* at 8-14.

[21] *Id.*

[22] Bryant *et al.*, *supra* note 12, 603.

[23] Katelyn Bryant-Comstock *et al.*, *Information about Sexual Health on Crisis Pregnancy Center Web Sites: Accurate for*

CPCs employ a number of deceptive delaying tactics to keep women from getting abortions, such as misrepresenting the likelihood of a spontaneous miscarriage,[24] or scheduling follow-up appointments for ultrasounds weeks after an initial appointment.[25] To encourage delay, some CPCs lie outright to women about how advanced their pregnancy is[26] or about the timeframe for legal abortions,[27] or schedule purported abortion appointments for clients at hospitals that do not perform abortions. *Lewis v. Pearson Found.*, 908 F.2d 318, 319 (8th Cir. 1990), *aff'd on reh'g*, 917 F.2d 1077 (8th Cir. 1990). Unwitting arrivals expecting abortion referrals are subjected to high-pressure anti-abortion presentations, and sometimes physically restrained from leaving until the presentation is finished.[28]

C. Vulnerable Pregnant Women Are Harmed by CPC Deception.

Deceptive delaying tactics by CPCs have a significant impact. Abortions become less safe, more expensive, and harder to access as a pregnancy advances.[29] A woman stalled by a CPC may miss the window for legal abortions altogether in the

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Adolescents?, 29 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 22, 23 (2016); Chen, *supra* note 2, 11.

[24] Holtzman, *supra* note 3, 85.

[25] Gallacher, *supra* note 7, 129; *see also* Chen, *supra* note 2, 10.

[26] Holtzman, *supra* note 3, 85.

[27] Joanne Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 PERSP. SEXUAL HEALTH 201, 202 (2012), http://www.jstor.org/stable/42004128.

[28] Julie Mertus, *Fake Abortion Clinics*, 16 WOMEN & HEALTH 95, 99 (1990).

[29] Holtzman, *supra* note 3, 85.

seventeen states that ban abortions after twenty weeks.[30] Women who decide against an abortion are still subject to increased health risks, since CPC clients are often discouraged from seeking medical care elsewhere, even when women report abnormal symptoms.[31]

The costs of delay are borne most by those least able to bear them. CPC clients are disproportionately young, uneducated, and low-income.[32] In fact CPCs often purposely target those constituencies, as well as women of color.[33] The costs of delaying abortion have particular impact on young and economically disadvantaged women.[34]

D. The California Legislature Had Ample Evidence of CPC Deception.

The FACT Act was passed in substantial part because California's legislature found that CPCs employed "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-

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[30] Guttmacher Institute, *State Policies on Later Abortion* (2018), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

[31] *Id.*; *see also* Ushma Upadhyay *et al.*, *Incidence of Emergency Department Visits and Complications After Abortion*, 125 OBSTETRICS AND GYNECOLOGY 175, 181 (2015) (study of Medi-Cal recipients found that risk of abortion-related complications rose after first trimester), https://cloudfront.escholarship.org/dist/prd/content/qt523956jn/qt523956jn.pdf.

[32] Rosen, *supra* note 27, 201.

[33] Gallacher, *supra* note 7, 121-22; Chen, *supra* note 2, 951.

[34] Rosen, *supra* note 27, 202.

informed, time-sensitive decisions about critical health care." JA 39.

The Legislature had ample grounds to reach this conclusion. The Legislature commissioned an extensive study of CPC practices, and took note of a second extensive study. JA 39-41. It was familiar with California litigation against California CPCs for deceptive practices. JA 42. The Legislature heard testimony about a study finding that 91% of CPCs visited in California provided misleading information about the health risks associated with abortion;[35] testimony that Heartbeat International advises its affiliated pregnancy centers to misleadingly attract women seeking reproductive health care with a website resembling a health care clinic site, while keeping a separate website directed to donors that highlights their anti-abortion mission;[36] testimony from a physician about patients who mistook CPCs for comprehensive women's health clinics, based on online advertising, were delayed in accessing needed services, and given medically inaccurate information;[37] and testimony from another physician who treated a young woman whose baby faced lifelong

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[35] *Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act: Hearing on Assemb. B. 775 Before the Assemb. Standing Comm. on Health*, 2015 Leg., Reg. Sess. (Cal. 2015) (statement of Amy Everitt, State Dir., NARAL Pro-Choice California).

[36] *Id.*

[37] *Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act: Hearing on Assemb. B. 775 Before the Sen. Standing Comm. on Health*, 2015 Leg., Reg. Sess. (Cal. 2015) (statement of Julianna Mello, OB-GYN, Univ. of Cal., Davis).

serious health risks after the mother, in reliance on a CPC, delayed seeking medical care for her diabetes.[38]

In sum the Legislature's concerns about deception by CPCs and the consequent harms to pregnant women were far from speculative.

II. GOVERNMENT REGULATION IS AN APPROPRIATE RESPONSE TO A PATTERN OF WIDESPREAD DECEPTIVE ADVERTISING.

"[D]emonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements," *Brown v. Hartlage*, 456 U.S. 45, 60 (1982). While the First Amendment protects even some deliberately deceptive speech, *United States v. Alvarez*, 567 U.S. 709, 718-20, 722-23 (2012) (plurality op'n), that protection is reduced when, as in this case, there is "legally cognizable harm associated with a false statement." *Id.* at 719.

A. Government Has Substantial Latitude to Protect the Public from Misleading Commercial Speech.

Commercial speech that has been found "misleading ... is not protected by the First Amendment." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). "Misleading advertising may be prohibited entirely." *In re R.M.J.*, 455 U.S. at 203. And even in cases of truthful advertising that is only

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[38] *Id.* (statement of Sally Greenwald, OB-GYN, Univ. of Cal. S.F.).

"potentially misleading," disclaimers may be required. *Id.* at 203.

The FACT Act should be reviewed in light of the sustained, continuing, and often coordinated, historical pattern of industrywide deception to which it is a response. If an ordinary business engaged in such practices, there would be no doubt that its deceptive advertising could be enjoined, *see, e.g., Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmBH*, 843 F.3d 48 (2d Cir. 2016) (upholding permanent injunction against false claims in advertising for home pregnancy test); provide a basis for liability, *see, e.g., Fanning v. F.T.C.*, 821 F.3d 164 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 627 (2017) (upholding finding that operator was personally liable for misrepresentations on website); or, as in this case, mitigated through factual disclosures. *See, e.g., ECM BioFilms, Inc. v. F.T.C.*, 851 F.3d 599 (6th Cir. 2017) (upholding order requiring that disclaimer accompany claims that certain plastics were biodegradable); *Removatron Int'l Corp. v. F.T.C.*, 884 F.2d 1489 (1st Cir. 1989) (upholding required disclosure in hair removal advertisements that effect is temporary). Two cases involved scenarios strikingly reminiscent of CPC tactics. *See Encyclopaedia Britannica, Inc. v. F.T.C.*, 605 F.2d 964 (7th Cir. 1979) (upholding required notification that home visits were sales calls, after finding that salespeople gained access to homes through deceptive ploys such as fake research questionnaires; *Nat'l Comm'n on Egg Nutrition v. F.T.C.*, 570 F.2d 157 (7th Cir. 1977) (upholding order requiring trade group to identify itself as such in advertising, to avert confusion caused by its misleading name).

When accurate factual disclosures are imposed, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651; *accord Milavetz*, 559 U.S. at 250.[39] *Zauderer* provides the standard for reviewing the disclosures required here.

B. Government May Regulate False or Misleading Speech Within an Industry Without a Particularized Showing That Each Affected Enterprise Has Engaged in Deceptive Speech.

NIFLA's objection that the Act applies "prophylactically" to all CPCs without a particularized showing that a given CPC "speaks anything 'misleading,'" NIFLA Br. at 7, is unavailing. "[W]here the record indicates that a particular form or method of advertising has in fact been deceptive ... or when experience has proved that in fact such

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[39] The Court has not made clear whether such deferential review is appropriate for factual disclosure requirements serving interests other than preventing deception. But, noting that the advertiser's "constitutionally protected interest in *not* providing any particular factual information ... is minimal," *Zauderer*, 471 U.S. at 651, every court of appeals that has considered the issue has applied deferential review to disclosures serving other state interests as well. *See, e.g., CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017); *Am. Meat Inst. v. U.S.D.A.*, 760 F.3d 218 (D.C. Cir. 2014) (en banc) (reversing contrary holdings); *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 556 (6th Cir. 2012); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005); *Nat. Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); *see also Beeman v. Anthem Prescription Mgmt.*, 315 P.3d 71, 90 (Cal. 2013).

advertising is subject to abuse, the States may impose appropriate restrictions." *In re R.M.J.*, 455 U.S. at 202-03; *see also Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (noting that even if a particular party's advertising of its trade name was "not in fact misleading," it could still be prohibited, because it exemplified a trend "which enhances the opportunity for misleading practices"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (upholding prohibitions on attorney solicitation as "prophylactic measures," not requiring "proof that [petitioner's] conduct constituted actual overreaching").

Factual disclosure requirements, which "trench much more narrowly on [First Amendment] interests than do flat prohibitions on speech," *Zauderer*, 471 U.S. at 651, may *a fortiori* be applied industrywide when there is evidence of a pattern of misleading advertising. "Evidence in the congressional record demonstrating a [misleading] pattern of advertisements" is sufficient to establish the likelihood of deception. *Milavetz*, 559 U.S. at 251 (upholding requirement that all debt relief advertising include specified disclosures, and dismissing objection that "the Government ... has adduced no evidence that [Petitioner's] advertisements are misleading"); *see also Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 735 (9th Cir. 2017) ("It is not necessary to show that any particular solicitation is actually deceptive.... [T]he state may reasonably decide to require disclosure for a class of solicitations that it determines pose a risk of deception"); *Pub. Citizen, Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011) (*Zauderer* review applies to disclosures targeting

advertising that is only *potentially* misleading); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 641 (6th Cir. 2010) (same).

Indeed, the law is replete with disclosure requirements aimed at preventing consumer deception imposed on whole industries or general types of advertising, without requiring a showing that a particular business has been deceptive. *See, e.g.*, 12 C.F.R. §§ 226.6 and 226.18 (offerors of consumer credit must make written, detailed disclosures of all finance charges, expressed as an annual percentage rate); N.M. Stat. § 59A-57-4(B)(1) (marketers of managed health care plans must disclose benefits, exclusions, responsibilities, and rights); Haw. Rev. Stat. § 431:10H-216 (long-term care insurance providers must disclose the tax consequences of purchasing such insurance).

Required disclosures may include referrals to other resources. *See, e.g.*, 15 U.S.C. § 2686(a) (sellers and leasers of target housing must provide referrals to state and local agencies for information about available government and private assistance and funding for lead hazard abatement, and advice on obtaining a list of contractors); Cal. Civ. Code § 2982(h) (car dealers and repair facilities must inform consumers about where to lodge complaints).

In passing the FACT Act, the California legislature had evidence of an extensive pattern of misleading advertising by CPCs. Accordingly, it may impose an industrywide disclosure requirement, provided it is reasonably related to preventing deception.

III. THE FACT THAT CPCs OFFER SERVICES WITHOUT PAYMENT DOES NOT CHANGE THE STANDARD OF REVIEW.

The foregoing precedents govern this case. Regardless of whether CPC speech is deemed commercial, the considerations justifying deferential review of factual disclosures and industrywide regulation apply equally here.

A. The FACT Act Can Plausibly Be Taken to Regulate Commercial Speech.

Neither the fact the disclosures are presented in clinics rather than attached to advertising, nor the fact that the advertising is for free services, provide good reason to conclude that the disclosures required by the FACT Act concern commercial speech less than do those upheld in *Milavetz* and *Zauderer*.

1. The location of the disclosures is not dispositive of whether the Act regulates commercial speech.

The court of appeals misapplied commercial speech doctrine in reasoning that the FACT Act "primarily regulates the speech that occurs within the clinic, and thus is not commercial speech." Pet.App. 19a n.5 (presumably referring to fact that the disclosures are posted or distributed at CPC facilities). But, as the D.C. Circuit explained with respect to disclosures aimed at correcting deceptive cigarette marketing, the argument "that the stand-alone corrective statements do not fall within the commercial speech doctrine because they are not

attached to advertisements, is a red herring. The context of the corrective statements does not dictate the level of scrutiny; rather, the level of scrutiny depends on the nature of the speech that the corrective statements burden." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (applying *Zauderer* review to "'freestanding' corrective statements ... not connected to existing advertising"). Because the disclosure requirements of the FACT Act were a legislative response to CPCs' misleading solicitation of clients for services, those solicitations are the speech burdened in this case, and it is their nature that dictates the appropriate level of scrutiny.

Accordingly, courts apply "reasonable relationship" review under *Zauderer* to requirements to publish disclosures apart from advertising or sales. *See, e.g., Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 453 (5th Cir. 2015) (reviewing under *Zauderer* required posting of remedial statement on third party website); *Greater Baltimore Ctr. for Pregnancy Concerns v. Mayor & City Council*, 721 F.3d 264, 284-87 (4th Cir. 2013) (en banc) (holding that more factfinding was required to determine whether required sign postings – not attached to advertising – at pregnancy center were commercial speech).

Even if the FACT Act was in part a response to misleading representations made by CPCs *after* clients were enrolled, that would be no reason for less deferential review. When providers of professional services mislead – or just misinform – actual clients, their speech receives no more protection than does

false advertising. *See, e.g., Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014) ("doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care").

Moreover, required informational postings entirely unrelated to advertising are commonplace at places of business, whether they warn of safety risks, notify consumers or employees of their rights, announce that cigarettes may not be sold to minors, or simply inform patrons of maximum occupancy or the location of an Exit. To hold that such postings are subject to scrutiny more exacting than "reasonable relationship" review would upend countless legal regimes.[40]

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[40] Indeed, the latter sort of posting in practice receives – and perhaps ought to receive – *less* protection than that accorded commercial speech. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 4 (2000) ("the category of commercial speech ought to be distinguished from the innumerable kinds of commercial communications, ranging from professional speech to product safety warnings, that do not receive the First Amendment protections even of 'commercial speech'").

2. Advertising by service providers seeking to attract clients may be commercial speech, even if no money is charged.

Several courts have reasoned persuasively that solicitation of non-paying clients by non-profit CPCs may be commercial speech.

North Dakota's high court considered a pregnancy clinic's "deceptive advertising ... [that] misleads persons into believing that abortions are conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda." *Fargo Women's Health Organization, Inc. v. Larson*, 381 N.W.2d 176, 177 (N.D. 1986). The court reasoned that whether the clinic received money from its clients was not dispositive of whether its speech was commercial. *Id.* at 180-81. What *was* dispositive was that the clinic's advertisements were placed in a commercial context, and were directed toward soliciting clients for services "rather than toward an exchange of ideas," making them "classic examples of commercial speech." *Id.* at 181.

Other courts have agreed that CPC advertising could be commercial speech even in the absence of economic motivation. *See First Resort*, 860 F.3d at 1274 (concluding that "advertising designed to attract a patient base in a competitive marketplace for commercially valuable services" was commercial speech, regardless of whether there was an economic motivation); *Greater Baltimore Ctr.*, 721 F.3d at 285-86 (holding that the absence of economic motivation

did not preclude classifying speech as commercial), citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983) (although a speaker's economic motivation is one of the characteristics of commercial speech, it is not necessary that each characteristic be present for speech to be commercial).

There is a strong case that the disclosures required by the FACT Act burden commercial speech.

B. Deceptive Marketing of Services Does Not Receive Greater Protection When the Services are Free of Charge.

In any event, regardless of how CPCs' speech is labeled, NIFLA's contention that CPCs' speech in the course of marketing and providing professional services is entitled to a higher level of First Amendment protection than speech in the course of marketing and providing otherwise similar services for payment is supported by neither precedent nor reason. There was no indication in *Milavetz*, 559 U.S. 229, that the Court intended to exempt attorneys acting *pro bono* from the disclosure requirements upheld there. To hold that the state has less authority – or indeed less duty – to protect recipients of *pro bono* services from deceptive marketing or advice, or simply from misinformation, than to protect recipients of paid services, would be to fail the most vulnerable members of society. Professional rules of conduct prohibiting deceptive or misleading representations, *e.g.* Cal. Bus. & Prof. Code § 651 (doctors); Wash. Admin. Code § 4-30-142 (accountants), do not include exemptions for *pro bono* services.

In re Primus, 436 U.S. 412 (1978), which held that the First Amendment protects the right to join together in litigation to advance political goals, *id.* at 426 (citations omitted), does not stand for the proposition that the level of scrutiny for regulations affecting service provider speech depends on whether the services are paid for. The Court did not hold that solicitations for free professional services could not constitute commercial speech.

A crucial distinction from this case is that there were no allegations that the solicitation at issue in *In re Primus* involved deception. To the contrary, the Court explicitly stated that findings of deceptive solicitation would alter the analysis: "The State's special interest in regulating members whose profession it licenses ... amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading ... or involves other features of deception." *Id.* at 438. In noting that it did not decide whether the state could permissibly regulate if "an innocent or merely negligent misstatement were made by a lawyer on behalf of an organization engaged in furthering associational or political interests," *id.* at 438 n.33, the Court clearly implied that protection would in any event *not* extend to deliberately deceptive solicitation by such an organization.

Moreover, the Court also distinguished the solicitation protected in *In re Primus* from the less protected solicitation in *Ohralik*, 436 U.S. 447, on the ground that the solicitation in the former case was by letter, rather than in person, and therefore, afforded less "opportunity for overreaching or coercion." *In re*

Primus, 436 U.S. at 435. When fearful, pregnant young women seek advice from professional health care providers, by contrast, there is great opportunity for overreaching and coercion.

Finally, *In re* Primus struck down a speech *restriction*. The present case involves only factual disclosures, a significantly lesser encroachment on First Amendment freedoms.

C. The Reasons for Deferential Review of Commercial Disclosures Apply Equally in the Context of Professional Speech.

Regardless of whether the speech at issue is classified as commercial, the reasons justifying deferential review of factual disclosures apply equally when professional services are offered free of charge. *See King v. Governor of New Jersey*, 767 F.3d 216, 234-36 (3d Cir. 2014) (concluding that "professional speech should receive the same level of First Amendment protection as that afforded commercial speech," because "commercial and professional speech share important qualities").

Like commercial contexts, professional contexts present particular dangers of harm to the public. Commercial speech receives reduced protection in large part because of "the government's legitimate interest in protecting consumers from 'commercial harms.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (citation omitted). But the state's interest in protecting the public from harm is not limited to commercial harms. First Amendment protection for false statements is generally reduced

where "legally cognizable harm [is] associated with a false statement." *Alvarez*, 567 U.S. at 719. For example, the First Amendment permits liability for defamation, even when there is no evidence of any monetary harm. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). Potential harm to the public from health services – whether paid for or free of charge – may be more consequential than most commercial harms. As noted, CPC deception may lead to serious harm to health, and in fact monetary harm as well, *e.g.*, the increased cost of a delayed abortion.

Consequently, just as commerce is "an area traditionally subject to government regulation," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality op'n), so is professional conduct. *See, e.g., Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("as part of their power to protect the public health, safety, and other valid interests," states have "broad power to establish standards for ... regulating the practice of professions"). This is particularly true of the provision of health services. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("it is clear the State has a significant role to play in regulating the medical profession"). Just as "the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions," *44 Liquormart*, 517 U.S. at 499 (citation omitted), so too does the state's power to regulate the professions justify its power to regulate speech in the conduct of a profession.

Like commercial speech, professional speech is protected and regulated principally in support of the

listener's (client's) interest in receiving reliable information, rather than for the speaker's interest in self-expression or advocacy on public issues. *See Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (contrasting permissible listener-centered regulation of commercial and professional speech with protection of speaker autonomy in public discourse). Because "First Amendment protection for commercial speech is justified in large part by the information's value to consumers," *Milavetz*, 559 U.S. at 249, when government "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." *44 Liquormart*, 517 U.S. at 501. Similarly, both the lead and concurring opinions in *Lowe v. SEC*, 472 U.S. 181 (1985) "emphasize the importance of the relationship to a client for whose benefit the State may regulate [professional] communication[s]. This is not far from the Court's examination of commercial communications with the interests of the listener in mind."[41] *See also Pickup*, 740 F.3d at 1228 (more regulation of speech is tolerated in the professional-client relationship, because "the purpose of [professional] relationships is to advance the welfare of the clients, rather than to contribute to public debate").

Finally, much as listeners are often less able to assess the accuracy of commercial speech than are its disseminators, *Virginia Bd. of Pharmacy*, 425 U.S. at

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[41] Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 844 (1999).

771 n.24 (justifying regulating commercial speech for accuracy), so are listeners reliant on professional expertise. *Cf. In re R.M.J.*, 455 U.S. at 202 ("The public's comparative lack of knowledge ... renders advertising for professional services especially susceptible to abuses").

The significant harms associated with misleading professional speech, the recognized authority of the state to regulate the professions, the primacy of listener interests in receiving accurate information, and the asymmetry in relevant knowledge between professionals and clients all support the conclusion that misleading professional speech should not be protected any more than is misleading commercial speech, and that the deferential standard of review applied to accurate, factual disclosures in commercial contexts is applicable to professional contexts as well.

D. The Disclosures Are Subject to Deferential Review Because They Occur in the Context of Professional Speech.

Because the factual disclosures required by the FACT Act occur in the context of professional speech, they should be reviewed under the deferential "reasonable relationship" standard applied to commercial disclosures in *Zauderer*, 471 U.S. 626.

Courts of Appeals that have considered the question have generally agreed that regulations of speech by professionals within the context of providing services to their clients are subject to reduced First Amendment scrutiny. *See King*, 767

F.3d. at 224 ("Because Plaintiffs are speaking as state-licensed professionals within the confines of a professional relationship, ... th[e] level of protection is diminished"); *Pickup*, 740 F.3d at 1228 ("the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it").

Factual disclosures in the context of professional speech should be accorded "reasonable relationship" review under *Zauderer*. *See King*, 767 F.3d at 236 (contrasting standard of review for professional speech restrictions with the *Zauderer* standard appropriate for review of "a compulsion of truthful factual information"). When courts have applied a higher level of scrutiny than *Zauderer* review in professional speech contexts, it has been either when (1) reviewing speech restrictions, rather than disclosures, *see Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc) (statute limiting physicians' authority to ask patients about firearms in their homes and keep records); *King*, 767 F.3d 216 (statute prohibiting licensed counselors from engaging in sexual orientation change therapy on minors);[42] *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (disciplining physicians for recommending medical marijuana); or (2) when reviewing compelled speech far more intrusive than a mere printed factual disclosure. *See Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (requirement that physicians show sonogram and describe fetus in real time to women seeking abortions).

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[42] The *King* court explicitly noted that disclosures are reviewed more deferentially. 767 F.3d at 236.

Staff of CPCs – whether licensed or unlicensed – are engaged in professional speech when they advise and refer clients, and schedule and perform tests. "Professional speech analysis applies ... where a speaker 'takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client.'" *Moore-King*, 798 F.3d at 569 (citations omitted); *see also King*, 767 F.3d at 232 ("a professional's speech warrants lesser protection ... when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment").[43]

Because the present case concerns unintrusive factual disclosures in a context of professional speech, reasonable relationship review is appropriate.

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[43] The Fourth Circuit's conclusion that similar disclosure requirements do *not* regulate professional speech, because pregnancy centers are not state-regulated or required to be licensed, and clients do not pay for services, *Greater Baltimore Ctr. for Pregnancy Concerns v. Mayor & City Council*, 879 F.3d 101, 109 (4th Cir. 2018), is unpersuasive. But the court did not explain why the First Amendment should allow government less authority to protect recipients of *pro bono* professional services from deception or other malpractice. And authority to regulate or require licensing for pregnancy centers, even if not fully exercised, surely includes the authority to require unlicensed providers to make clear that they do not offer licensed professional services, particularly when providers dress in medical scrubs and otherwise seek to create the impression that they are medical professionals.

E. CPCs' Deceptive Professional and Commercial Speech Are Not "Inextricably Intertwined" With Fully Protected Speech.

CPC solicitations of and communications to clients are neither public advocacy nor "inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

Of course, health care providers and other professionals do not surrender their full rights to advocate for their beliefs outside the professional relationship. "There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).

The FACT Act affects CPCs' personalized speech with clients, *not* speech to the public at large. It is the CPCs who have chosen to mask their advocacy behind offers of services; they remain free to engage in fully protected public advocacy for their beliefs. And nothing in the Act interferes with them advocating for their beliefs even to clients. But their ideological motivations, no matter how sincere, do not immunize their misrepresentations to clients and potential clients once they have entered the marketplace of service providers.

Hidden advocacy disguised as the offering of health services is not an instance of "inextricably intertwined speech." *Riley*, 487 U.S. at 796. It is an instance of deception in solicitation and in the offering

of professional services. By contrast, there were no allegations that the regulated fund-raisers in *Riley* engaged in any deception. And the *Riley* Court made clear that the First Amendment does not prevent government from "prohibit[ing] professional fundraisers from obtaining money on false pretenses or by making false statements." *Id.* at 800.

The context of professionals offering pregnancy-related services further distinguishes the present case from *Riley*. The combination of highly vulnerable clients and the likelihood of deferring to presumed professional expertise increase the need to protect against deceptive communications. *Cf. Ohralik*, 436 U.S. at 465 ("the potential for overreaching is significantly greater when ... a professional trained in the art of persuasion, personally solicits a[] distressed lay person").

In sum, whether CPC advertising and communications to clients are classified as commercial or professional speech or analyzed apart from a categorical approach, the considerations justifying relatively deferential review of regulation aimed at misleading communications are equally applicable here. The fact that CPCs offer services without charge provides no reason to review factual disclosures, or industrywide regulations aimed at preventing deception, more stringently here than in commercial contexts.

IV. THE FACT THAT THE DISCLOSURES CONCERN A TOPIC ABOUT WHICH THERE ARE STRONG FEELINGS AND CONVICTIONS DOES NOT AFFECT THE STANDARD OF REVIEW.

NIFLA's contentions that the disclosures here are ideological or viewpoint-based, concern a "controversial" topic, or compel CPCs to engage in speech against conscience, likewise fail to justify more stringent scrutiny here than that accorded commercial speech disclosures under *Zauderer*.

A. That the Factual Disclosures Relate to an Issue About Which There Is Controversy Does Not Change the Analysis.

That the required postings may concern "a deeply divisive ideological matter," NIFLA Br. at 30, does not affect the standard of review. "[W]hether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information ..., not on whether the disclosure ... incites controversy." *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 569 (6th Cir. 2012). The requirement that automobile manufacturers disclose mileage ratings, 49 U.S.C. § 32908, is not subject to heightened scrutiny because of public controversies about climate change, nor do disputes about mandatory vaccination necessitate heightened scrutiny of requirements that schools report immunization rates. *E.g.* Va. Code § 22.1-271.2; N.C. G.S. 130A-155(c). The FACT Act requires only straightforward statements of uncontroversially true facts.

B. That the Disclosures Concern a Topic About Which Members of the Regulated Enterprises Have Strong Convictions Does Change the Analysis.

NIFLA's contention that the licensed facility disclosure offends the First Amendment by compelling speech against its members' convictions, NIFLA Br. at 17, 24-26, is misplaced. As noted, speakers' interest in autonomy is of secondary concern in the context of commercial and professional speech, and that is the discourse in which NIFLA and its allies have chosen to place themselves.

Even in a case with no commercial elements, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. [FAIR]*, 547 U.S. 47 (2006), the Court rejected an argument much like NIFLA's. Because of their opposition to discriminatory military policies, law schools contended that required notices facilitating military recruiting constituted compelled speech against their convictions, arguing that "treat[ing] military and nonmilitary recruiters alike in order to comply ..., could be viewed as sending the message that they see nothing wrong with the military's policies, when they do." *Id.* at 64-65.[44] The Court rejected the law schools' argument, reasoning that the schools remained free to criticize military policies, and that onlookers could understand the difference between speech the school agrees with and

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[44] Although *FAIR* concerned a condition on funding, the Court explicitly decided the case on the basis that the requirements would withstand First Amendment review even if they were directly compelled. 547 U.S. at 60.

"speech the school permits because legally required to do so." *Id.* at 65.

Similar reasoning is apposite here. Like the Solomon Amendment challenged in *FAIR*, the FACT Act imposes "nothing ... approaching a Government-mandated pledge or motto" that CPCs "must endorse." *Id.* at 62. Like the law schools, CPCs are required only to post neutral factual messages informing of an available option. CPCs remain free to speak against abortion and to distance themselves from any implicit message that they see nothing wrong with abortion. No reasonable observer would think that posted information about available services including abortion was the speech of an organization dedicated to opposing abortion, any more than a posting notifying employees of their rights under labor law, *see* 29 C.F.R. pt. 471(A), App. A, represents the views of the owner of the workplace. *Cf. R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 925 (9th Cir. 2005) (no reasonable observer could believe that anti-tobacco industry ads funded by tax on cigarette sales were the tobacco industry's speech). If there is any confusion in this case, it is attributable to the CPCs' disingenuousness in presenting themselves as something other than ideological advocates. Their own misrepresentations do not transform an ordinary disclosure requirement into a violation of their First Amendment rights.

If the Solomon Amendment – where there were no concerns about deceptive speech, and which had no relation to commercial speech or solicitation of clients for services – did not call for heightened scrutiny, still less so does the FACT Act.

C. The Disclosures Are Viewpoint-Neutral.

NIFLA's contention that the FACT Act targets viewpoint is baseless. To begin, the Act does not force anyone to advance a "viewpoint-biased message." NIFLA Br. at 18. Like the Solomon Act, the FACT Act requires only the provision of neutral information about available options.

If CPCs are targeted, it is not out of opposition to their viewpoint, NIFLA Br. at 7, 18, but because of their extensive record of harmful deception.[45] Much as "a State may choose to regulate ... advertising in one industry but not in others, because the risk of fraud ... is in its view greater there," *IMS Health*, 564 U.S. at 579, California is entitled to focus its deception-remedying efforts where there is evidence of widespread harmful deception. If there were a widespread pattern of anti-overpopulation zealots advertising 'adoption counseling centers,' and credible evidence that pregnant mothers seeking adoption resources at those centers were pressured into obtaining abortions and inundated with misinformation about the psychological harms of giving a child up for abortion, California would presumably require disclosures from those 'adoption centers' as well. If California did not, CPCs could reasonably complain that they were targeted for their

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[45] NIFLA misleadingly quotes a legislative summary's use of "unfortunately" as evidence of animus against CPCs' viewpoint. *See* NIFLA Br. at 34. It is clear in context that "unfortunately" refers not to CPCs' discouraging abortions, but to CPCs' deceptive advertising and counseling. *See* JA 84-85.

viewpoint. But in the actual world, such a complaint is unfounded.

D. Content Neutrality Cannot Distinguish Compelled Speech Offensive to the First Amendment From Compelled Disclosures Subject to Deferential Review.

NIFLA's arguments that the disclosures here are subject to heightened scrutiny because they are content-based is little more than a smokescreen – the concept of content neutrality is inapplicable to compelled disclosures. "By definition, all mandatory disclosures require some defined class to say something rather than something else." Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 178 (2016). Therefore, unless *all* disclosure requirements are to be subject to strict scrutiny, content discrimination cannot serve as a useful distinction in this context.

Even if only disclosures *triggered* by certain speech content are considered "content-based," it would not make sense, for example, to subject warnings of the hazards of smoking to a higher level of scrutiny if they are required only in cigarette advertising (content-triggered) than if they were required in advertising for *all* products (not content-triggered). *See Am. Meat Inst. v. United States Dept. of Agriculture*, 760 F.3d 18, 33 n.1 (D.C. Cir. 2014) (Kavanaugh, J., concurring in judgment) ("The First Amendment does not tolerate ... compel[led] disclosures unrelated to the product or service – for example, a compelled disclosure on all food packages

(not just cigarette packages) that cigarette smoking causes cancer").

The Court has repeatedly applied a lenient standard of review in upholding required disclosures of specific content triggered by specific speech content. *See Milavetz*, 559 U.S. at 233 (requiring specific content – "We are a debt relief agency," triggered by specific speech content – offers of debt relief); *Zauderer*, 471 U.S. at 650 (requiring specific content – that legal clients might be liable for litigation costs, triggered by specific content – offers of legal representation on contingency). The dubious supposition that this Court intended, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), to overturn decades of precedent *sub silentio* was definitively refuted when the Court subsequently issued a remand to determine whether a state statute could "be upheld as a valid disclosure requirement under *Zauderer*." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017).

V. THE CHALLENGED DISCLOSURES ARE THE SORT OF SPEECH REGULATION LEAST OFFENSIVE TO THE FIRST AMENDMENT.

The protective measures of the FACT Act infringe minimally on First Amendment freedoms, in several respects.

First, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Zauderer*, 471 U.S. at 651 n.14. When the Court has struck down speech

srestrictions, it has often suggested that required disclosures would offer a less problematic alternative. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 (1980) (instead of banning electricity advertising, state could "further its policy of conservation" by "requir[ing] that ... advertisements include information about ... relative efficiency and expense").

The principle is not limited to commercial contexts, extending even to core political speech. *See Meese v. Keene*, 481 U.S. 465, 480 (1987) (upholding labeling requirement, because "Congress did not prohibit, edit, or restrain the distribution of advocacy materials.... Congress simply required the disseminators ... to make additional disclosures that would better enable the public to evaluate [their] import"). Required disclosures of political campaign spending similarly receive less stringent scrutiny than do restrictions on political spending, because disclosure requirements "do not prevent anyone from speaking," and because of the public's "informational interest." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366, 369 (2010).

Second, requiring a private speaker to convey a message is least offensive to the First Amendment when an observer is unlikely to attribute the message to the private speaker. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009) (finding monuments on government land constitutional in part because "there is little chance that observers will fail to appreciate the [governmental] identity of the speaker"); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (finding no violation of First

Amendment rights in part because mall owners "could disclaim any sponsorship of the message and could explain" that the message was posted "by virtue of state law"). CPCs can likewise easily dissociate themselves from the offending disclaimers. Nothing here "effectively restricts the ability of doctors to distance themselves from" a required statement. *Planned Parenthood v. Rounds*, 530 F.3d 724, 746 (8th Cir. 2008). The physician need not even deliver the disclosures herself.

Finally, the disclosures required here do not intrude unduly on vulnerable clients who may be unwilling listeners. *Cf. Stuart*, 774 F.3d at 255 (striking down requirement that a woman seeking an abortion view in real time a sonogram of her fetus while the doctor describes the fetus, "irrespective of the needs or wants of the patient, in direct contravention of ... the principle of patient autonomy"); *Rounds*, 530 F.3d at 746-47 (striking down as coercive pre-abortion requirements that woman sign each page of a written disclosure to certify that she has read and understood it).

Because the FACT Act infringes minimally on First Amendment freedoms, it is subject to a lenient standard of review.

CONCLUSION

Because California may remedy deceptive speech by service providers, and has chosen a remedy that minimally burdens the First Amendment, the proper standard with which to examine the challenged disclosures is "reasonable relationship" review under *Zauderer*.

Respectfully submitted,

Thomas Bennigson
Counsel of Record
Seth E. Mermin
Sophia TonNu
PUBLIC GOOD LAW CENTER
1950 University Avenue, Suite 200
Berkeley, CA 94704
(510) 336-1899
tbennigson@publicgoodlaw.org

Counsel for Amici Curiae

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